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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1921.

No. 203.

SOUTH COVINGTON & CINCINNATI STREET RAILWAY COMPANY AND SUBURBAN ELECTRIC COMPANY, APPELLANTS,

vs.

CITY OF NEWPORT, KENTUCKY.

SUPPLEMENTAL BRIEF FOR APPELLANTS.

RICHARD P. ERNST,
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(28,044)

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1. On the power of the Federal court to enjoin proceedings in a State court, we call attention to

Home Tel. & Tel. Co. *v.* Los Angeles, 227 U. S., 278, on page 293:

"Finally the subject was elaborately considered in *Ex parte* Young, 209 U. S., 123. Without attempting to fully state the case it suffices to say that although the proceeding was one in *habeas corpus*, the controversy in its ultimate aspect concerned the power of a Federal court to prevent the enforcement of railroad rates fixed under State legislative authority which

were confiscatory. In the course of an opinion reviewing the whole field it was said (p. 155):

"'The various authorities we have referred to furnish ample justification for the assertion that individuals, who, as officers of the State, are clothed with some duty in regard to the enforcement of the laws of the State, and who threaten and are about to commence proceedings, *either of a civil or criminal nature*, to enforce against parties affected an unconstitutional act, violating the Federal Constitution, may be enjoined by a Federal court of equity from such action.'" (Italics ours.)

Ex parte Young, 209 U. S., 123, on pages 142-143:

"The question of jurisdiction, whether of the circuit court or of this court, is frequently a delicate matter to deal with, and it is especially so in this case, where the material and most important objection to the jurisdiction of the circuit court is the assertion that the suit is in effect against one of the States of the Union. It is a question, however, which we are called upon, and which it is our duty, to decide. Under these circumstances, the language of Chief Justice Marshall in *Cohens v. Virginia*, 6 Wheat., 264, 404, is most apposite. In that case he said:

"'It is most true that this court will not take jurisdiction if it should not; but it is equally true that it must take jurisdiction if it should. The judiciary cannot, as the legislature may, avoid a measure because it approaches the confines of the Constitution. We cannot pass it by because it is doubtful. With whatever doubts, with whatever difficulties, a case may be attended, we must decide it, if it be brought before us. We have no right to decline the exercise of jurisdiction which is given, than to usurp that which is not given. The one or the other would be

treason to the Constitution. Questions may occur which we would gladly avoid, but we cannot avoid them. All we can do is to exercise our best judgment, and conscientiously perform our duty.'"

Also 161-162:

"It is further objected (and the objection really forms part of the contention that the State cannot be sued) that a court of equity has no jurisdiction to enjoin criminal proceedings, by indictment or otherwise, under the State law. This, as a general rule, is true. But there are exceptions. When such indictment or proceeding is brought to enforce an alleged unconstitutional statute, which is the subject matter of inquiry in a suit already pending in a Federal court, the latter court having first obtained jurisdiction over the subject matter, has the right, *in both civil and criminal cases*, to hold and maintain such jurisdiction, to the exclusion of all other courts, until its duty is fully performed. *Prout v. Starr*, 188 U. S., 537, 544. But the Federal court cannot, of course, interfere in a case where the proceedings were already pending in a State court. *Taylor v. Taintor*, 16 Wall., 366, 370; *Harkrader v. Wadley*, 172 U. S., 148.

"Where one commences a criminal proceeding who is already party to a suit then pending in a court of equity, if the criminal proceedings are brought to enforce the same right that is in issue before that court, the latter may enjoin such criminal proceedings. *Davis, &c., Co. v. Los Angeles*, 189 U. S., 207. In *Dobbins v. Los Angeles*, 195 U. S., 223-241, it is remarked by Mr. Justice Day, in delivering the opinion of the court, that 'it is well settled that where property rights will be destroyed, unlawful interference by criminal proceedings under a void law or ordinance

> may be reached and controlled by a court of equity.' *Smyth v. Ames* (*supra*) distinctly enjoined the proceedings by indictment to compel obedience to the rate act." (Italics ours.)

2. When we filed our reply brief, in which we cited Mitchell *v.* Dakota Central Telephone Co., 246 U. S., 396, we had not had opportunity to examine the record and briefs in that case. We have now examined them, and are confirmed in our claim that that case is decisive of the case at bar on the question of jurisdiction.

The municipal action complained of in that case was a *reesolution*—not an ordinance.

The resolution declared the rights of the telephone company had expired; ordered the company to remove its poles, wires, etc., and notified the company that if it failed to comply, then the "City Council will take such steps as may be neecessary to secure the immediate removal," etc.

There was therefore no threat of anything except further leegislative action.

The city made the same contentions as are made by the ciity in this case; among others, that no forcible action was thhreatened. It cited the same authorities as are relied on byy the city in this case. But this court held that the district court had jurisdiction.

3. The city could not require the removal of the wires, if att all, except by municipal action finding and declaring them to be a public danger (Passaic *v.* Pub. Service Com., 75 N. J. Eq., 379). The resolution complained of, therefore, umdertakes by its own force to terminate the contract right, amd if its findings and declarations are unjustified by the

facts, as alleged in the bill, the resolution itself is an impairment of a contract and a taking of property in violation of the Federal Constitution, irrespective of the method of its enforcement.

4. Nothing in the answer can defeat the jurisdiction authorized by the allegations of the bill. In St. Paul, M. & U. Ry. *v.* St. Paul N. P. Ry., 68 F., 2, the Circuit Court of Appeals for the Eighth Circuit said, page 10:

> "If jurisdiction is fairly disclosed by the plaintiff's statement of his own cause of action, it cannot be defeated by an answer or plea so conceived and drawn as to avoid the consideration of any Federal question or questions."

Respectfully submitted,

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